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No. 83-1587

# In the Supreme Court of the United States

OCTOBER TERM, 1983

NAARTEX CONSULTING CORPORATION, PETITIONER

*v.*

WILLIAM P. CLARK, SECRETARY OF INTERIOR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Mineral Lands Leasing Act, 30 U.S.C. 181 *et seq.*, creates an implied private right of action for cancellation of federal oil and gas leases.

2. Whether the assignment of an alleged claim against the United States by the unsuccessful drawee under the Department of the Interior's simultaneous oil and gas leasing program violates the federal anti-assignment laws, 31 U.S.C. 3727 (formerly Section 203) and 41 U.S.C. 15.

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## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A74) is reported at 722 F.2d 779. The opinion of the district court (Pet. App. A77-A129) is reported at 542 F. Supp. 1196. The decision of the Interior Board of Land Appeals (Pet. App. A133-A161) is reported at 48 I.B.L.A. 166.

### JURISDICTION

The judgment of the court of appeals (Pet. App. A75-A76) was entered on November 29, 1983. The petition for a writ of certiorari was filed on February 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. On June 1, 1975, the Bureau of Land Management (BLM) issued oil and gas lease number W-50394 to Norbert F. Albrecht, the successful drawee.[1] Albrecht later assigned his interest in the lease to J.S. Harrell, retaining a five per cent royalty interest in the lease. Numerous subsequent assignments of drilling rights, reservations and transfers of royalty interests followed. Since 1977, the lease has been in producing status. Pet. App. A7-A8.

On January 25, 1979, more than three and one-half years after lease W-50394 was issued, Alvin Abrams, president of Geosearch, Inc., filed a protest with BLM challenging the issuance of the lease (Pet. App. A8). Geosearch claimed to be acting on behalf of K.J. Feil, one of the unsuccessful applicants for lease W-50394 (*id.* at A138). The protest charged that Albrecht was not qualified to receive lease W-50394 because his entry card had been filed by a filing service, Fred L. Engle, d/b/a Resource Service Co. (RSC), under a service agreement that violated Department of the Interior regulations requiring disclosure of all interested parties and prohibiting multiple filings (*id.* at A79-A80, A138). The protest requested cancellation of any interests in lease W-50394 held by persons who were not bona fide purchasers, and reissuance of those lease interests to Geosearch and the class of persons represented by the protest (*id.* at A138-A139).

BLM dismissed the protest because the lease was, by then, in a producing status and the BLM lacks the authority to cancel a producing lease administratively (Pet. App.. A10). Mineral Lands Leasing Act § 31(b), 30 U.S.C. 188(b). The Interior Board of Land Appeals (IBLA) dismissed Geosearch's appeal for failure to comply with departmental regulations requiring timely filing of a Statement of Reasons. *Geosearch, Inc.*, I.B.L.A. Docket No. 79-270 (May 6, 1979).

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[1] In all, 2,683 drawees participated in the drawing.

Four months later, Abrams filed another protest against the issuance of lease W-50394, this time as president of Naartex Consulting Corp., urging the same defects he had alleged in the aborted Geosearch protest.[2] Naartex based its protest upon rights assigned to it by Russell Huff, another unsuccessful applicant in the 1975 drawing.[3] On September 28, 1979, BLM dismissed the protest on the grounds that (1) Huff retained no interest in the lease because he failed to challenge its issuance within 30 days, (2) subsequent title transfers of the lease rendered its new holders "bona fide purchasers" whose interests may not be cancelled even though the initial holder may have violated the Act, and (3) Sections 27(h)(1) and 31(a) of the Act, 30 U.S.C. 184(h)(1) and 188(a), preclude the cancellation of a producing lease. Pet. App. A11-A12. On June 9, 1980, the IBLA dismissed Naartex's appeal for the same reasons, noting also that Naartex "ha[d] not shown that the service agreement alleged to exist between [RSC] and Albrecht" constituted an "interest" that should have been disclosed pursuant to the regulations (*id.* at A154).

On September 8, 1980, 91 days after IBLA's decision, Naartex filed a petition seeking reconsideration of the decision. IBLA denied the petition on September 18 because the petition was not timely filed and no "extraordinary circumstances" had been shown to justify the IBLA's reconsideration of its decision (Pet. App. A14) (regulations require that motions for reconsideration be filed within 30 days of

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[2]Naartex and Geosearch share the same address, and Alvin Abrams is president of both companies. Both Naartex and Geosearch are in the business of protesting the issuance of public land leases on behalf of unsuccessful lease applicants. Pet. App. A11 n.6. See *Naartex Consulting Corp.* v. *Watt*, 542 F. Supp. 1196, 1198 (D.D.C. 1982); *Geosearch, Inc.* v. *Andrus*, 508 F. Supp. 839, 841 (D. Wyo. 1981).

[3]Huff was not among the top three drawees.

receipt of a copy of the Board's decision. 43 C.F.R. 4.126 (1982)). On April 6, 1981, the Secretary of the Interior denied Naartex's petition for review (Pet. App. A14-A15).

2. On July 6, 1981, 91 days after the Secretary's order of denial, Naartex filed suit in the United States District Court for the District of Columbia claiming that the administrative failure to cancel the lease was arbitrary and capricious and a deprivation of property without due process of law. The complaint also sought damages from various private defendants for intentionally deceiving the Department and for violating its regulations. Pet. App. A15.

The district court granted motions to dismiss on the grounds that: (1) the court lacked personal jurisdiction over the private defendants; (2) venue did not lie in the District of Columbia; (3) the private defendants were indispensable parties to the action; (4) the Mineral Lands Leasing Act creates no private right of action; (5) the anti-assignment laws, 31 U.S.C. 3727 and 41 U.S.C. 15, bar Naartex from asserting Huff's claims against the government; (6) Huff himself should not be permitted to intervene in this action because he failed to challenge the issuance of the lease in a timely manner, and because intervention should not be employed to cure an otherwise futile action; and (7) Naartex and Huff both lacked standing to prosecute the suit (Pet. App. A16-A17).

3. The court of appeals affirmed (Pet. App. A1-A74). It held that (1) the district court lacked personal jurisdiction over the private defendants; (2) venue did not lie in the District of Columbia; (3) the district court did not err in refusing to transfer Naartex's claims to another district where personal jurisdiction and venue could be had because Naartex failed to show that its claims could properly be heard in any federal court; (4) Naartex's claims ran afoul of the federal anti-assignment laws; (5) joinder of Huff to

avoid the anti-assignment prohibition would have been futile because the Mineral Lands Leasing Act and regulations thereunder preclude cancellation of a producing lease except by judicial proceedings instituted by the Attorney General; (6) the Mineral Lands Leasing Act does not create a private right of action; and (7) the district court did not abuse its discretion when it failed to address Naartex's meritless common law fraud claim (Pet. App. A19-A74).

## ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Naartex's suit is barred because it failed to comply with the 90-day period of limitations for judicial review specified by Section 42 of the Mineral Lands Leasing Act, 30 U.S.C. 226-2:

> No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter.

See, *e.g.*, *Winkler* v. *Andrus*, 614 F.2d 707, 709 (10th Cir. 1980).[4] The Senate report accompanying the bill that

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[4]See also 43 C.F.R. 3100.0-9. "No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within 90 days after the final decision of the Secretary relating to such matter."

The regulations provide that the decision of the IBLA is the final decision of the Secretary of the Interior with respect to appeals regarding the simultaneous oil and gas lease program. 43 C.F.R. 4.1(b)(3). The regulations further state that no further appeal will lie and that a petition for reconsideration by the Secretary has no bearing on the efficacy of the IBLA decision. 43 C.F.R. 4.21(c).

became Section 226-2 emphasized that the 90-day limit for obtaining review was necessary to "remove a potential cloud on acreage subject to leasing." S. Rep. 1549, 86th Cong., 2d Sess. 5 (1960). See, *e.g.*, *Geosearch, Inc.* v. *Andrus*, 508 F. Supp. 839, 845 (D. Wyo. 1981); *Runnells* v. *Andrus*, 484 F. Supp. 1234, 1239 (D. Utah 1980).

Congress may, of course, impose conditions upon the government's consent to be sued, and "when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block* v. *North Dakota*, No. 81-2337 (May 2, 1983), slip op. 13 (citations omitted).

In this case, the IBLA dismissed Naartex's appeal on June 9, 1980, and denied reconsideration of that decision on September 16, 1980. Even assuming that the "final" decision of the IBLA occurred on the latter date, Section 226-2 required that any action for judicial review must commence by December 15, 1980; but Naartex waited until July of the following year. Accordingly, this case was subject to dismissal for failure to comply with the statutory time limits.[5]

2. The court of appeals correctly held that the Mineral Lands Leasing Act does not create an implied private right of action. As the court noted (Pet. App. A43), legislative

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[5]Naartex's effort to have the Secretary review the IBLA's decision in late 1980 is irrelevant for purposes of the finality of the IBLA's prior decision. 43 C.F.R. 4.21(c); see *Geosearch, Inc.* v. *Andrus*, 494 F. Supp. 978 (D. Wyo. 1980).

In addition, Naartex's suit was also subject to dismissal because it failed to comply with the 30-day period of limitation for review prescribed by departmental regulations. 43 C.F.R. 4.411(a). Here, the drawing for lease W-50394 was held in March 1975, the lease was issued on June 1, 1975 (Pet. App. A7), and Naartex did not file an appeal on the lease issuance until September 14, 1975, 114 days after the lease was issued. An appeal which is not timely is subject to immediate dismissal. 43 C.F.R. 4.402.

intent is the "dispositive factor" in determining the existence of a private right of action.[6] Accordingly, "[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California* v. *Sierra Club*, 451 U.S. 287, 297 (1981).

Petitioner has failed to satisfy the four tests announced in *Cort* v. *Ash*, 422 U.S. 66, 77 (1975): (1) whether it is within the class of persons for whose especial benefit the statute was enacted; (2) whether there is any express or implicit indication of congressional intent to create or deny such a cause of action; (3) whether the existence of or right to bring such an action would be consistent with the purposes of the legislative scheme; and (4) whether the cause of action involves a matter traditionally relegated to state law, in an area basically of concern to the states, so that it would be inappropriate to infer a federal cause of action.

In passing the Mineral Lands Leasing Act, Congress sought to exercise its authority over the public lands "[t]o promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain" (ch. 85, 41 Stat. 437) The Act was thus adopted for the benefit of the general public and not for the benefit of any especial class. The intent was to establish an orderly system by which the federal government could control the leasing of public land. See *Udall* v. *Tallman*, 380 U.S. 1, 21-22 (1965); *California Co.* v. *Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961). As the court of appeals correctly concluded (Pet. App. A46), "[t]he Secretary, and not the citizenry at large, was intended to oversee the proper allocation and development of the public lands."

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[6]See, *e.g.*, *Jackson Transit Authority* v. *Transit Union*, 457 U.S. 15, 22-23 (1982); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 91 (1981).

Further, since Section 27(h)(1) of the Mineral Lands Leasing Act, 30 U.S.C. 184(h)(1), expressly authorizes only the Attorney General to seek cancellation of a lease acquired in violation of the Act, the court correctly held that the Act does not reflect a congressional determination to permit an implied cause of action of the sort Naartex asserts (Pet. App. A46-A50).

3. The court of appeals correctly agreed with the district court's conclusion that Naartex's attempt to assert the rights of Russell Huff was " 'a classic violation of the federal anti-assignment laws' " (Pet. App. A65-A66 (citation omitted)). Huff participated in the 1975 drawing; Naartex did not. The federal anti-assignment law, 31 U.S.C. 3727 (formerly Section 203) provides: "a transfer or assignment of any part of a claim against the United States Government or of an interest in the claim" may be made "only after [the] claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued" (31 U.S.C. 3727(a)(1) and (b).[7] Furthermore, Section 3727(b) requires that any assignment "must be attested to by 2 witnesses." Huff's agreement with Naartex violated these provisions.

The court of appeals thus correctly concluded that the Huff assignment "unquestionably violates" Congress' purpose to prevent the government from being "harassed by multiplying the number of persons with whom it had to deal." *Hobbs* v. *McLean*, 117 U.S. 567, 576 (1886). See, *e.g.*, *United States* v. *Shannon*, 342 U.S. 288, 291-292 (1952); *Ball* v. *Halsell*, 161 U.S. 72 (1896); *Kingsbury* v. *United States*, 563 F.2d 1019, 1024 (Ct. Cl. 1977); *Scanwell*

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[7]The Department of the Interior requires approval in order to ensure that an assignee of a lease fulfills the qualifications prerequisite to lease or lease ownership. This includes maximum acreage limitations imposed by 30 U.S.C. 184(d) and 43 C.F.R. 3101.1-5, and satisfaction of the sole party-in-interest condition.

*Laboratories, Inc.* v. *Thomas*, 521 F.2d 941, 944-945 n.3 (D.C. Cir. 1975), cert. denied, 425 U.S. 910 (1976).

4. In addition to the grounds relied on by the court of appeals, this action was also subject to dismissal because petitioner lacked standing, as the district court found (Pet. App. A121-A125):

> It is evident, then, that the present and prospective plaintiffs, unable to explain how any actual injury they have suffered can be remedied by this court, lack standing to prosecute this action. *See Pullman v. Chorney*, 509 F. Supp. 162 (D. Colo. 1981) [aff'd on other grounds, 712 F.2d 447 (10th Cir. 1983)].

See, *e.g.*, *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978) ("[t]he more difficult step in the standing inquiry is establishing * * * that the exercise of the Court's remedial powers would redress the claimed injuries"). Even if Naartex could have succeeded in securing the cancellation of lease W-50394, it would not have personally benefited, since it was not a second or third drawee — nor, for that matter, was Huff (Pet. App. A62-A63).[8] Cf. 30 U.S.C. 184(h)(2) (the lease here was assigned to a bona fide purchaser). Furthermore, since the decision to lease is discretionary, *Burglin* v. *Morton*, 527 F.2d 486, 488-489 (9th Cir. 1975), cert. denied, 425 U.S. 973 (1976), even if a drawing is invalidated, the Secretary has the option whether or not to reoffer a parcel in a

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[8]Under the applicable regulations, three offering cards are drawn at random for each lease offering, and the lease is issued to the first drawn applicant (43 C.F.R. 3112.2-1(a)(3) (1979)), provided, among other things, that the first drawee meets all regulatory requirements. If the applicant whose card is drawn first is not qualified, or if his card is not completed in the manner specified in the regulations, the second drawee is selected. If none of the first three drawees is qualified, no lease is awarded. If the Secretary decides to reoffer the tract for leasing, a new drawing is held (43 C.F.R. 3112.5-1).

subsequent drawing. If he offers the parcel, an unsuccessful drawee's rights are no greater than those of any other citizen. See *Anicker* v. *Gunsburg*, 246 U.S. 110, 120 (1918) ("It does not appear that had [the Secretary] disapproved the Gunsburg lease, he would have approved the one to appellant, and until this affirmatively appears, appellant has no standing which permits a court by its decree to award the leasehold to him").

In this case, since Naartex's prospects of obtaining a lease under the SOG program were so remote, and since it could not show a substantial probability that, even if the court had granted it the requested relief, it would benefit in some perceptible, tangible fashion, it lacked standing.[9]

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[9]Petitioner's claim is at least as speculative as those involved in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth* v. *Seldin*, 422 U.S. 490 (1975); and *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973).

The courts of appeals have also declined to confer standing on plaintiffs where requested judicial relief will not redress the claimed injury. *E.g.*, *Gonzales* v. *Gorsuch*, 688 F.2d 1263 (9th Cir. 1982); *Greater Tampa Chamber of Commerce* v. *Goldschmidt*, 627 F.2d 258 (D.C. Cir. 1980); Public Citizen v. *Lockheed Aircraft Corp.*, 565 F.2d 708 (D.C. Cir. 1977).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1984

DOJ-1984-04